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Supreme Court, U.S.
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No. 04-505

In The Supreme Court of the United States

GLENN J. CONROY,

Petitioner,

v.

ABRAHAM CHEVROLET-TAMPA, INC., d/b/a AUTOWAY CHEVROLET,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The respondent, Abraham Chevrolet, does not dispute the existence of the 4-4 split in the circuits over whether courts should give jurors pretext instructions in discrimination cases—a question the respondent concedes "is undoubtedly an important one." Resp. at 20. Nor does the respondent dispute the existence of the subsidiary 3-1 circuit split over whether the failure to give pretext instructions is prejudicial if the plaintiff is permitted to argue the substance of pretext to the jury. Ordinarily two undisputed circuit splits over questions of federal law, one of which involves most of the circuits, would be enough to justify review.

The respondent argues, however, that the Court should not grant certiorari because the petitioner, Glenn Conroy, supposedly suffered no prejudice. The argument rests on two grounds: Conroy was allowed to argue the substance of pretext to the jury in closing, and the jury probably would not have found for him even if it had been instructed on pretext. Neither is an appropriate basis to deny review.

1. Closing Argument Regarding Pretext is No Basis to Deny Review.

The respondent's contention based on Conroy's closing argument actually *supports* review because there is a 3-1 circuit split over whether closing argument regarding pretext is an adequate substitute for a pretext instruction. Pet. at 11-12. Whether closing argument adequately substitutes for a pretext instruction is, of course, closely

related to the primary question in this case: whether pretext instructions should be required.[1]

2. The Respondent Improperly Construes the Disputed Facts in its Favor to Argue Conroy Suffered no Prejudice.

Given that Conroy is seeking review following a court's failure to give a jury instruction, the facts are to be construed in his favor—not the respondent's. *Connecticut Mut. Life Ins. Co. v. Wyman*, 718 F.2d 63, 65 (CA3 1983) ("When the correctness or adequacy of a jury instruction is at issue, an appellate court may not review the evidence in the light most favorable to the verdict winner. There can be no deference to a factual finding tainted by legal error. If the jury was misled as to the law on a material point, '[a court] cannot presume that the jury applied the appropriate standard in deciding [an issue].'") (quoting *McPhee v. Reichel,* 461 F.2d 947, 951 (CA3 1972), and citing *Hunziker v. Scheidemantle,* 543 F.2d 489, 497-98 (CA3 1976)); *see also Caballero v. City of Concord*, 956 F.2d 204, 207 (CA9 1992) ("In reviewing a civil jury instruction for harmless error, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's

[1] Unsurprisingly, only two of the circuits requiring pretext instructions have felt compelled to state expressly whether closing argument is an adequate substitute to prevent prejudice. In *Townsend v. Lumbermens Mutual Casualty Co.*, 294 F.3d 1232 (CA10 2002), the majority directly rejected the dissent's argument that an "aggressive closing argument" based on pretext prevents prejudice to plaintiffs. *Id.* at 1241; *see also id.* at 1246-47 (Brorby, J., dissenting). In the other case, *Kanida v. Gulf Coast Medical Personnel LP*, 363 F.3d 568, 579 (CA5 2004), a panel that disagreed with the circuit's binding precedent requiring a pretext instruction held that a pretext closing argument was an adequate substitute for the instruction.

verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party.").

The respondent's "no prejudice" argument nonetheless ignores the procedural posture of this case by improperly assuming disputed facts in *the respondent's* favor. Most of those facts support the respondent's post hoc claim that Conroy was fired because he was an unsuccessful worker (Resp. at 7-8, 18), despite significant evidence that Conroy was an excellent worker and was not terminated based on poor performance (Pet. at 6, 17). Since that claim is adequately addressed in the Petition, there will be no further reply here.

The respondent makes one discrete factual argument that does, however, require a direct reply. The respondent asserts that the jury probably would have found for the respondent even if the district court had given a pretext instruction because Conroy was replaced by an *older* worker. But the respondent initially replaced Conroy with a substantially younger worker and only fired that younger worker, and replaced him with someone one year older than Conroy, *after* Conroy complained of age discrimination to Human Resources Director Roberta Bonavia. Pet. at 4-5, 16-17.

The respondent nonetheless improperly claims—as fact—that Conroy did *not* tell Ms. Bonavia that he believed he was fired because of his age when he met with her about unemployment compensation:

> Conroy did not initially allege at that time, however, that he had been fired because of his age. R:66:95; R:67:7-8. Instead, Conroy conveyed to

> Bonavia his alleged belief that he was terminated for refusing to fire Weber. R:67:7-8.

Resp. at 6-7. In fact, Conroy testified that that is *exactly* what he told Ms. Bonavia: "[I] told her the situation that I felt that I was being discriminated against because of my age." Doc. 66 at 94-95. (The relevant portion of Conroy's testimony is included as an appendix to this Reply Brief.)

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

Glenn J. Conroy,

Plaintiff,

Vs.

CIVIL ACTION NO.
01-01466CV-8-T-27MAP

Abraham Chevrolet-Tampa, Inc.

Defendant.

United States Courthouse
Tampa, Florida
October 17, 2002

BEFORE: HONORABLE JOSEPH H. RODRIGUEZ
UNITED STATES DISTRICT JUDGE

* * *

[94] Q. Okay. Did you ever contact Miss Bonavia about your employment situation?

A. Yes, I did.

Q. When was that?

A. After I was let go.

Q. What did you talk about with her?

[95] A. Basically told her the situation that I felt that I was being discriminated against because of my age. Again I was fired so I did go to her kind of late at the time but I went to her, spoke to her about that. Spoke to her about being fired because oh [sic] retaliating against not firing Mr. Weber.

Q. Let me ask you something. Did you talk to Miss Bonavia before you got your unemployment compensation

paperwork that said you'd been let go for poor performance?

A. I think I went over there with that.

Q. Okay. So, before you got the unemployment compensation paperwork that said they had let you go for poor performance, you didn't think to tell anybody you felt it was age discrimination?

A. Other than her.

Q. But you didn't go to her before you got the paperwork, did you?

A. No. No.

Q. Okay. So, you didn't say anything to anybody about age discrimination until you got the paperwork that said you'd been let go for poor performance. Isn't that true?

A. That's true. Because that's not the reason why I was let go. And Miss Bonavia instructed the Human Resource officer at Autoway in Tampa to change it, after I believe she spoke to Mr. Bledsoe.

Q. But in the time after you were let go to when you got [96] that paperwork, did you think it was age discrimination?

A. Yes.

* * *